KUMPULAN BINARAMA SDN. BHD., RE

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[COMPANIES WINDING-UP NO. D3-28-51-89]
19 NOVEMBER 1990

COMPANY LAW: *Winding up - Error in petition - Effect of - Petition opposed by 3rd party - Merits - Failure to heed s. 218 notice - Presumption raised in favour of petitioner - Unable to pay its debts - Rebuttable presumption - Companies Act 1965, ss. 218(1)(e), 218(2)(a) - Companies (Winding-Up) Rules 1972, r. 194(1).*

The petitioners had sued the 1st, 2nd and 3rd defendants, D1, D2 and D3. At the O. 14 hearing on 26 November 1987 judgment was entered against the defendants in the sum of RM99,848.05. On 6 October 1988, the plaintiffs' solicitors issued and served a notice of demand on D1 pursuant to s. 218(2) of the Companies Act 1965 (the Act).

D1 failed to heed the notice and on 26 December 1988 the petitioner presented this winding-up of D1. The said petition was opposed by A.V.M. Construction which stated that:

(1) there were errors in the petition in respect of the particulars given of the judgment that had been entered against the company;

(2) in the event a winding-up order is made against D1 A.V.M. Construction would suffer substantial losses as there were substantial amounts due to D1 from the JKR which was to be diverted to A.V.M., arguing that the petitioners should not use the Courts as a means "to clutch avariciously" on interest belonging to a *bona fide* third party for value without notice.

On 6 July 1990, the petitioners by means of an *ex parte* order had the error in the extracted judgment corrected.

A director of D1 in his affidavit submitted:

(1) that the petition should be dismissed due to the technical error and because the amendment to the order which was obtained *ex parte* was irregular;

(2) that as D1 had obtained an order for costs against the petitioners which had not been taxed, it would be unjust and inequitable to have D1 wound up.

Held:

[1] Although there was an irregularity in the petition as regards the said judgment, this judgment was duly entered against D1 on 26 November 1987 for the relevant sum in the petition of D1 there was no attempt to have this judgment set aside.

[2] The present petition was grounded on D1 being unable to pay its debts under s. 218(1)(e). Further, the s. 218 notice refers to the fact of judgment being entered on 26 November 1987 and not to the form of the judgment as extracted and accordingly the error perpetuated in the form of judgment cannot be successfully relied on by D1. There is therefore a valid unrebutted presumption that the company is unable to pay its debts.

[3] The petitioner is also aided by r. 194(1) of the Companies (Winding-Up) Rules 1972 which stipulates that no proceedings under the Bankruptcy Act or Rules shall be invalidated by any defect or irregularity unless substantial injustice is caused. In this case, there has been no suggestion that the irregularity has caused any injustice.

[4] The fact that A.V.M. Construction might benefit by a stay does not provide any ground for granting such a stay as a stay will only be granted if it would result in some benefit to the company and to all its creditors. Nothing has been advanced that provides even the semblance of merit in the opposition to the petition by the respondent company and by A.V.M. Construction.

Legislation referred to:
Companies Act 1965, ss. 218(1)(e), (2)(a)
Companies (Winding-Up) Rules 1972, r. 194(1)
Rules of the High Court 1980, O. 14 r. 1

For the petitioner - Thomas Mariasoosay; M/s. Azman, Davidson & Co.
For the respondent co. Kumpulan Binarama Sdn. Bhd - Mazlinda bt. Makhzan; M/s. Ng Yook Woon Andrew T.C. Saw & Co.
For the A.V.M. Construction - Anthony Fernandez; M/s. Anthony Fernandez & Partners (opposing petition)
For the Jala's (M) Sdn. Bhd. - Franklin Goonting; M/s. Wahab Rashid & Co. (supporting petition)

JUDGMENT

VC George J:

The petitioners Blacktop Industries Sdn. Bhd., had sued Kumpulan Binarama Sdn. Bhd., as 1st defendant, and Chan Chuan Chai and Syed Yusof bin Syed Salim as 2nd and 3rd defendants respectively, in Kuala Lumpur High Court Civil Suit No. D3-24-1130-87.

The 1st and 3rd defendants having entered an appearance, O. 14 proceedings were taken out. The 1st and 3rd defendants were represented by Counsel at the O. 14 hearing on 26 November 1987 when the Senior Assistant Registrar who heard the application found for the plaintiff and judgment was entered against the defendants in the sum of RM99,848.05

> together with interest on the said sum at the rate of 8% per annum from 28 February 1987 to the date of realisation, solicitor and client's cost between the plaintiff and its solicitors, to be taxed and costs of RM350.

There has been no appeal against the judgment. It has not been set aside. Accordingly that judgment continues to obtain. Now in the form of the judgment of the Court that was extracted, the civil suit number was given as D3-24-1130-86 instead of the correct number - the "7" in "87" was typed as "6". However the names of the parties were as appeared in the title to the suit D3-24-1130-87. The rest of the form of judgment sets out the actual terms of the said judgment that was pronounced by the Senior Assistant Registrar on 26 November 1987.

I pause to note that the error in the numbering of the civil suit in the form of the judgment was obviously a typing error which could have been corrected by invoking the slip rule to change the erroneous "6" into the correct "7".

On 6 October 1988 the plaintiff's solicitors issued and served a notice of demand on the 1st defendant company pursuant to s. 218(2) of the Companies Act 1965. It is relevant to reproduce the whole of that notice:

Notice
Pursuant to s. 218 of
The Companies Act 1965

To:
M/s. Kumpulan Binarama Sdn. Bhd.
Lot No. 2.130, Wisma Central,
Jalan Ampang,
50450 Kuala Lumpur

Re:

Outstanding sum of RM99.848.05 together with interest thereon at the rate of 8% per annum from 28 February 1987 until date of full realisation and costs of RM350 due to Blacktop Industries Sdn. Bhd., pursuant to judgment dated 26 November 1987.

Take notice that you are required to pay to us as solicitors for Blacktop Industries Sdn. Bhd., of No. 39, Jalan 1/119, Taman Bukit Hijau, 6th mile, Jalan Cheras, 56000 Kuala Lumpur the sum of Ringgit Ninety-Nine Thousand Eight Hundred and Forty-Eight and cents Five (RM99,848.05) only together with interest thereon at the rate of 8% per annum from 28 February 1987 to the date of full realisation and costs of RM350 pursuant to the judgment dated 26 November 1987 within Twenty-One (21) days from the service of this notice failing which you will be deemed to be unable to pay the aforesaid debt and appropriate action will be taken for the winding-up of Kumpulan Binarama Sdn. Bhd.

Dated 6 October 1988.

...

M/s Azman Davidson & Co.
Solicitors for Blacktop
Industries Sdn. Bhd. of
No. 39, Jalan 1/119,
Taman Bukit Hijau,
6th mile, Jalan Cheras,
56000 Kuala Lumpur.

It is to be noted that the notice refers to the judgment dated 26 November 1987, but does not refer to the number of the suit (which puts to any suggestion that the contents of the notice were misleading). Particularly as the 1st defendants was represented at the proceedings when the judgment referred to in the notice was entered against it, the 1st defendant cannot but concede that the notice had reference to what the 1st defendant was well aware of, namely - the judgment entered against it on 26 November 1987.

Section 218 (2)(a) provides as follows:

A company shall be deemed to be unable to pay its debts if:

(a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred dollars then due notice has been served on the company by leaving at the registered office a demand under his hands or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three week, thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

The notice was apparently ignored. The 1st defendant company, to use the words of the section:

...neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor

or at all. It follows that pursuant to the section, the 1st defendant company is deemed to be unable to pay its debts.

On 26 December 1988 the plaintiff caused the petition herein to be presented. Paragraphs 5, 6, 7 and 8 of the petition are reproduced:

> 5. Under the terms of the judgment in default of appearance obtained by your petitioner against the company on 26 November 1987 in Kuala Lumpur High Court summons no. D3-24-1130-86 the company was indebted to your petitioner in the sum of RM99,848.05 together with interest thereon at the rate of 8% per annum from 28 February 1987 to the date of realisation and costs of RM350.
>
> 6. On 6 October 1988 your petitioner by their solicitors, M/s. Azman Davidson & Co., issued a notice to the company demanding for payment of the said judgment sum.
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> 7. The said judgment debt remains wholly unpaid and unsatisfied and is still justly due and owing to your petitioner.
>
> 8. In the circumstances, it is just and equitable that the company should be wound up.

It is to be noted that while the date the judgment was obtained is correctly stated the aforesaid error in the number of the civil action is perpetuated and on top of that the judgment is erroneously stated to be a judgment in default of appearance.

The initial affidavit in opposition was deposed to by one A. Sivasubramaniam who sets out his credentials to depose the affidavit in paras. 1 and 2 of the affidavit:

> 1. I am the sole proprietor of A.V.M. Construction, a company incorporated under the laws of Malaysia with its address at No. 98-2, Rumah Wilayah, Jalan Gombak, 53200 Kuala Lumpur.
>
> 2. By virtue of a business relationship with Kumpulan Binarama Sdn. Bhd. (the company), I am duly authorised to make this affidavit on its behalf as well as on behalf of A.V.M. Construction. The facts deposed to herein are therefore within my personal knowledge and records kept by myself and the company unless where otherwise stated.

I pause to note that he states what is *ex facie* erroneous, that is, that A.V.M. Construction is a corporation. As to the said second paragraph of the affidavit, in the absence of disclosure of the terms of the "business relationship" it is meaningless. Be that as it may the affidavit was read. En. Sivasubramaniam first of all points to the error in the petition in respect of the particulars given of the judgment that had been entered against the company. That an O. 14 judgment was entered against the 1st defendant is however conceded. He then seeks to persuade that in the event a winding-up order is made "it will lead to a definite loss to A.V.M. Construction". The affidavit also shows that apparently attempts had been made to have substantial amounts said to be due to the company from the Jabatan Kerja Raya (J.K.R.) diverted to A.V.M. Construction. Apparently a deed of assignment was about to be executed by the company in favour of A.V.M. Construction when the presentation of the petition herein thwarted that move. En. Sivasubramaniam does not deal with the s. 218 presumption nor does he have anything to say of the company's indebtedness whether in respect of the petitioner or other creditors two of whom have given notice of intention to appear and support the petition.

In a second affidavit En. Sivasubramaniam *inter alia* seeks to persuade that A.V.M. Construction stands to lose and that what is due from the J.K.R., to the company belongs to A.V.M. Construction and that by the petition the petitioner "who has no interest in the

project" (that is the contract with J.K.R.) "should not use the Court as means to clutch avariciously on interest belonging to a *bona fide* **third party for value without notice**" (emphasis supplied by En. Sivasubramaniam). The second affidavit ends:

> ...whereby there was a mutual understanding between Kumpulan Binarama Sdn. Bhd. and myself that since it was abundantly clear the A.V.M. Construction was solely responsible for the running of this project it will be assigned to A.V.M. Construction.

In a 3rd affidavit En. Sivasubramaniam continues with the theme calculated to try and persuade the Court that all proceeds from the J.K.R. contract that the company has belongs to A.V.M. Construction to the exclusion of the creditors of the company.

On 6 July 1990 while the hearing of the petition was pending the petitioner by means of an *ex parte* order had the error in the extracted judgment corrected. They went beyond doing only that. They had the order embellished by having added to it the words:

> ...pursuant to O. 14 r. 1 of the RHC. 1980.

Then comes an affidavit of Tuan Syed Yusof bin Syed Salim who claims to be a director of the company. He contends that the petition should be dismissed with costs because of the technical error and because the amendment to the order was obtained *ex parte* which it is alleged makes it irregular.

Tuan Syed Yusof filed another affidavit in which it is pointed out that the company had obtained an order for costs against the petitioner and there was to be taxation thereof in view of which it is contended that it would be unjust and inequitable to have the company wound up. This is explained (or attempted to be explained) by the words:

> ...as I verily believe that all the actions so far that have been taken by the petitioner against the respondent company were calculated to harass the company.

I first deal with the technical objection:

There is no doubt that there is an irregularity in the petition (and a *fortiorori* in the verifying affidavit) in that in contending that the company was, by a judgment entered on 26 November 1987, indebted to the petitioner in the sum of RM99,848.05, interest and costs, reference was made to the wrong suit and the judgment was erroneously stated to be "in default of appearance". However that is no escape from the fact that in the presence of Counsel for the company, judgment had been duly entered against the company on 26 November for the said RM99,848.05 interest and costs which judgment has not been set aside.

Now, it is to be noted that the fact that a company owes money does not *per se* entitle the creditor to obtain a winding up order. It is also to be noted that in the instant case the petition is not grounded on the existence of the debt but on s. 218(1)(e) of the Companies Act 1965, that is, that the company is unable to pay its debts, to rely on which the petitioner invokes the presumption provided by s. 218(2)(a) by referring to the s. 218 notice dated 6 October 1988 which as has been seen was ignored by the company. As has further been seen, the s. 218 notice refers to the fact of judgment being entered on 26 November 1987 and not to the form of the judgment as extracted and accordingly the error perpetuated in the form of the judgment cannot be successfully relied on by the company *vis-a-vis* the s. 218 notice. Accordingly the position that obtains is that there is a valid unrebutted presumption that the company is unable to pay its debts.

For the petitioner r. 194(1) of the Companies (Winding-Up) Rules 1972 was also called to aid. The subrule is as follows:

> (1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.

There has been no suggestion and in any event I have failed to see that the irregularity has caused any injustice to the company or anybody else. Accordingly the objection taken on the technical ground provided by the contents of para. 5 of the petition has to be and is rejected.

I now come to the opposition by A.V.M. Construction and En. Sivasubramaniam.

What I understood En. Sivasubramaniam to be saying was that although the J.K.R. contract (which was worth some RM2.8 million and in respect of which another RM1 million was realisable) was given to the company, the people behind the company in respect of the J.K.R. contract was A.V.M. Construction and that accordingly the RM1 million was the entitlement of A.V.M. Construction and if the company was wound up A.V.M. Construction would not be able to get at that RM1 million. The relationship between A.V.M. Construction and the 1st defendant appeared to be the classic Ali-Baba set-up. Counsel for A.V.M. Construction made no bones about it. However I do not go into the legality of such a set up. Suffice for me to note that at best A.V.M. Construction could be said to be some sort of creditor of the company. But what that has to do in respect of the issue as to whether the company is able to pay its debts is not explained. I could understand and perhaps even give consideration to an application of a stay of the hearing of the petition if that could result in some benefit coming to the company and thereby to all its creditors (and not to one or even some of them). That A.V.M. Construction might benefit by a stay does not provide any ground for granting such a stay. A.V.M. Construction by En. Sivasubramaniam has accused the petitioner of being avaricious. Against that what is seen is that their own unashamed approach is the thoroughly selfish one of looking after themselves even if it might mean that it be at the expense of the other creditors. Nothing has been advanced in favour of the company or of its other creditors. Nothing has been advanced that provides even the semblance of merit in the opposition to the petition by the respondent company and by A.V.M. Construction and by En. Sivasubramaniam.

There will be an order in terms of prayers (a), (b) and (c) of the petition save that the costs of and incidental to the reading of the affidavits affirmed by En. Sivasubramaniam and of and incidental to the getting up in relation to those affidavits shall be paid by En. Sivasubramaniam and/or A.V.M. Construction.

Also found at [1991] 3 CLJ 2167